



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

ANDY BESHEAR
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITOL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

OAG 17-020

September 12, 2017

Subject: Whether a tax increase by a county fire protection district is subject to a recall vote or reconsideration.

Requested by: Bobbi Jo Lewis
Anderson County Attorney

Written by: Marc G. Farris

Syllabus: A property tax rate set by a fire protection district is not subject to the generally applicable statutory limits for special purpose governmental entities. Therefore, a tax increase by the fire protection district will not be subject to recall, even if the increase is greater than 4% over the compensating tax rate.

Statutes construed: KRS 65A.010; KRS 75.040; KRS 132.023

OAGs cited: OAG 82-323

Opinion of the Attorney General

You have requested an opinion as to whether a tax increase by the Anderson County Fire Protection District (the "District"), a county fire protection district established pursuant to KRS Chapter 75, will be subject to the recall provisions of KRS 132.023, which limits the tax rates set by special purpose governmental entities.

KRS 75.040 empowers the trustees of a fire protection district to levy a tax on property within the fire protection district, which "shall not exceed ten cents (\$0.10) per one hundred dollars (\$100) of valuation as assessed for county taxes, for the purpose of defraying the expenses of establishment, maintenance, and operation of the fire department" KRS 75.040(1)(a). The statute further provides that "[t]he rate set in this subsection shall apply, *notwithstanding the provisions of KRS 132.023.*" *Id.* (emphasis added).

KRS 132.023 prescribes limits to the taxes imposed by "special purpose governmental entities." Specifically, under KRS 132.023, a tax rate levied by a special purpose governmental entity "which will produce revenue from real property, exclusive of revenue from new property, more than four percent (4%) over the amount of revenue produced by the compensating tax rate shall be subject to a recall vote or reconsideration by the special purpose entity, as provided for in KRS 132.017, and shall be advertised as provided in paragraph (b) of this subsection." KRS 132.023(3)(a).¹ We understand from your letter that the District seeks to increase its tax rate by an amount greater than four percent over the compensating tax rate.

Prior to 2016, a fire protection district operating under Chapter 75 qualified as a "special purpose governmental entity" for purposes of Chapter 132. Under Chapter 132, a "'[s]pecial purpose governmental entity' shall have the same meaning as in KRS 65A.010." KRS 132.010(25). KRS 65A.010, in turn, provides that

"Special purpose governmental entity" . . . means any agency, authority, or entity created or authorized by statute which:

¹ KRS 132.017(2)(a) provides that the "portion of a tax rate . . . subject to recall . . . shall go into effect forty-five (45) days after its passage." During those forty-five days, "any five (5) qualified voters who reside in the area where the tax levy will be imposed may commence petition proceedings to protest the passage of the ordinance." KRS 132.017(2)(b). If the petition is properly filed with the county clerk after it is "signed by a number of registered and qualified voters residing in the affected jurisdiction equal to at least ten percent (10%) of the total number of votes cast in the last preceding presidential election," KRS 132.017(2)(c), then the tax levy "shall be suspended from going into effect until after the election referred to in subsection (3) of this section is held," KRS 132.017(2)(d). In that case, the taxing entity must "cause to be submitted to the voters of the county, district, consolidated local government, or urban-county at the next regular election, the question as to whether the property tax rate shall be levied." KRS 132.017(3).

1. Exercises less than statewide jurisdiction;
2. Exists for the purpose of providing one (1) or a limited number of services or functions;
3. Is governed by a board, council, commission, committee, authority, or corporation with policy-making authority that is separate from the state and the governing body of the city, county, or cities and counties in which it operates; and
4. a. Has the independent authority to generate public funds; or
b. May receive and expend public funds, grants, awards, or appropriations from the state, from any agency, or authority of the state, from a city or county, or from any other special purpose governmental entity.

KRS 65A.010(9)(a). KRS 65A.010 also includes "fire protection services" among the "[e]xamples of the types of public services that may be provided by special purpose governmental entities." KRS 65A.010(9)(c)(1). Thus, prior to 2016, a fire protection district like the District qualified as a "special purpose governmental entity" under KRS Chapter 65A.010, and therefore under KRS Chapter 132.

In 2016, however, the legislature amended KRS 65A.010 to provide that "[s]pecial purpose governmental entity shall not include . . . [a]ny fire protection district or volunteer fire department district operating under KRS Chapter 75." KRS 65A.010(9)(d)(9)(a); *see also* 2016 Ky. Acts ch. 91, § 1 (adding this subsection).

In light of this amendment, we conclude that the District's proposed increase would not be subject to recall, as the District is not a "special purpose governmental entity" under KRS 132, and therefore is not subject to the limits on tax increases prescribed by KRS 132.023. Instead, the limits on tax rates set by the District pursuant to KRS 75.040(1)(a) are governed solely by that statute, "notwithstanding the provisions of KRS 132.023."

A recent decision by the Court of Appeals, issued before the 2016 statutory amendment, came to the same conclusion. In an unpublished opinion, *Spencer*

Cnty. Fire Prot. Dist. v. Puckett, No. 2006-CA-000938-MR, 2008 WL 344187, at *3 (Ky. Ct. App. Feb. 8, 2008), the Court of Appeals addressed the interaction of these two statutes and held that "the unambiguous language of KRS 75.040 provides that a tax levied pursuant to KRS 75.040 is not subject to the recall provisions of KRS 132.023." *Id.* at *3. In that case, as in the facts presented in your letter, a fire protection district sought to increase its previously established tax rate by greater than four percent over the compensating rate. *See id.* at *1. ("In a December 22, 2005, Opinion and Order, the circuit court determined 'that once the initial [tax] rate was established pursuant to KRS 75.040, the provisions of KRS 132.023 govern any subsequent levy of tax increase, which also makes it subject to recall petition as set out in KRS 132.017.'"). The Court of Appeals held that a seven percent tax increased levied pursuant to KRS 75.040 was not subject to the limitations prescribed by KRS 132.023, and therefore was not subject to a recall vote. *Id.* at *2.

We are aware of our prior opinion, OAG 82-323, which concluded that "KRS 132.023 applies whenever an already established rate [under KRS 75.040] is increased." In light of the 2016 amendment to KRS 65A.010, that conclusion is no longer correct. To the extent that OAG 82-323 requires that a tax levied by a fire protection district is subject to recall under KRS 132.023, that opinion is hereby withdrawn as superseded by statute.

In sum, we conclude that the plain language of the statutes indicates that a fire protection district's tax rate must comply only with the requirements of KRS 75.040 and is not subject to KRS 132.023, including its recall provision, even when an already established rate is increased.

Sincerely,

ANDY BESHEAR
ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to read "Marc G. Farris", is written over the typed name.

Marc G. Farris
Assistant Attorney General